

In the United States
Circuit Court of Appeals
For the Ninth Circuit. 10

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLEE.

ALFRED WRIGHT and
GORDON HALL, JR.,
621 South Spring Street Bldg., Los Angeles, Cal.,
Solicitors for Appellee.

FILED



TOPICAL INDEX.

	PAGE
The Pleadings.....	2
Effect of Amendment of Bill and Scope of Motion to Dismiss.....	3
What Questions Are Properly Before the Court?.....	5
Argument	8
1. The Elements of Similarity That Exist Between Appellant's Play and Appellee's Picture.....	8
2. In Which, If Any, Elements of Similarity Between the Two Works, Has Appellant Any Rights of Ownership?.....	10
3. There Has Been No Appropriation by Appellee of Any Material Portion of Appellant's Work.....	15
4. The District Court Was Not Required to Make Findings of Fact and Conclusions of Law Upon Granting the Motion to Dismiss.....	24
Conclusion	26

INDEX TO APPENDIX.

	PAGE
Outline of the Play "Dancing Destiny".....	27
Outline of the Picture "Stowaway".....	31

TABLE OF AUTHORITIES CITED.

	PAGE
Caruthers v. R. K. O. Radio Pictures, Inc., D. C. N. Y., 20 Fed. Supp. 906.....	6
Dymow v. Bolton, C. C. A. 2, 11 Fed. (2d) 690.....	3
Eichel v. Marcin, D. C. N. Y., 241 Fed. 404.....	12
Fendler v. Morosco, 253 N. Y. 281, 171 N. E. 56.....	11, 13
Frankel v. Irwin, D. C. N. Y., 34 Fed. (2d) 142.....	19
Harold Lloyd Corporation v. Witwer, C. C. A. 9, 65 Fed. (2d) 1	3
Louisville & N. R. Co. v. U. S., D. C. Ill., 10 Fed. Supp. 185....	24
Lowenfels v. Nathan, D. C. N. Y., 2 Fed. Supp. 73.....	4, 6
Nichols v. Universal Pictures Corporation, C. C. A. 2, 45 Fed. (2d) 119.....	3, 20
Ornstein v. Paramount Productions, Inc., D. C. N. Y., 9 Fed. Supp. 896.....	21, 25
Parker v. St. Sure, C. C. A. 9, 53 Fed. (2d) 706.....	25
Roe-Lawton v. Hal E. Roach Studios, et al., D. C. Cal., 18 Fed. (2d) 126.....	10
Sheldon et al. v. Metro-Goldwyn-Mayer Picture Corp. et al., C. C. A. 2, 81 Fed. (2d) 49.....	23
Shipman v. R. K. O. Radio Pictures, Inc., D. C. N. Y., 20 Fed. Supp. 249.....	3, 4, 6, 7
Witwer v. Harold Lloyd Corporation, 65 Fed. (2d) 1.....	14

No. 8847

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLEE.

This appeal has been taken from a decree of the District Court of the United States for the Southern District of California, Central Division, dismissing with prejudice appellant's bill in equity as amended pursuant to stipulation and order, the decree having been made and entered upon the making of an order granting appellee's motion to dismiss. The District Court allowed the appeal on May 2, 1937 [Tr. pp. 27-29] upon an assignment of errors set forth on pages 30-32 of the transcript.

The Pleadings.

The allegations of appellant's bill are succinctly summarized on pages 2 and 3 of her brief. It purports to state a cause of action for the infringement of those rights commonly characterized as "common law copyright", which, in California, are conferred upon the authors of products of the mind by section 980 of the Civil Code. The jurisdiction of the District Court was based upon diversity of citizenship, the suit being one in equity between a citizen of California and a citizen of New York, wherein the matter in controversy is alleged to be in excess of \$3,000.00. Appellee filed an answer which is of no consequence whatsoever upon this appeal, for it was, in effect, withdrawn for present purposes from the consideration of the court by a stipulation and order permitting appellee to file its motion to dismiss the bill (amended pursuant to the stipulation and order hereinafter mentioned), and providing that the motion was to be based and should be considered and determined upon the bill as amended, unaffected by any admission, denial or allegation contained in the answer theretofore filed. [Tr. p. 22.]

The stipulation and order amending the bill provided that the bill might be amended "by the filing with the clerk of the above entitled court of a copy of plaintiff's play entitled 'Dancing Destiny' and a release print of defendant's motion picture entitled 'Stowaway', which should both be deemed to be annexed to said bill of complaint as schedules thereto and incorporated therein with the same force and effect as though originally included therein as integral parts thereof." [Tr. p. 21.]

This course was followed by the parties in order to enable them to take advantage of the expeditious method so successfully employed in the United States courts in

New York for the determination of matters of this nature upon a motion to dismiss made upon the ground that a comparison of the plaintiff's and defendant's respective works would affirmatively show, as a matter of law, no actionable appropriation of copyrightable elements. Appellee filed its motion to dismiss the bill of complaint, amended as aforesaid, upon the grounds set forth on pages 23 and 24 of the transcript which urge in terms that the bill, as amended, fails to state a cause of action and shows that plaintiff has neither done, nor suffered to be done, anything constituting an infringement of any rights of plaintiff in or to the play entitled "Dancing Destiny".

Effect of Amendment of Bill and Scope of Motion to Dismiss.

The annexation to the bill of the plaintiff's and defendant's respective literary works enables the court to determine the question of infringement, by the pragmatic method of comparing the two works themselves, as approved in *Nichols v. Universal Pictures Corporation*, C. C. A. 2 (1930), 45 Fed. (2d) 119, the standard of the ordinary observer being applied. (*Harold Lloyd Corporation v. Witwer*, C. C. A. 9, 65 Fed. (2d) 1; *Dymoz v. Bolton*, C. C. A. 2 (1926), 11 Fed. (2d) 690.)

The procedure makes it possible to bring the matter before the court on a summary motion to dismiss and it has been characterized as an "economic, convenient, and prompt method" of dealing with these causes "when it is not desired—at least initially—to dispute access, but only to dispute any unfair use of the copyrighted work by the alleged infringer".

Shipman v. R. K. O. Radio Pictures, Inc., D. C. N. Y. (1937), 20 Fed. Supp. 249.

As pointed out in *Lowenfels v. Nathan*, D. C. N. Y. (1932), 2 Fed. Supp. 73, this practice achieves its purpose "because the annexation of these two books to the complaint prevents this motion to dismiss from being involved in any awkward admissions or conclusions of fact such as the above mentioned allegations of plagiarism and copying by the authors of 'Of Thee I Sing' from the second act of 'United States With Music' because the annexation of the two books constitutes an amendment to the complaint which supersedes by the realities the allegations of conclusions of fact which I have mentioned."

The scope and implications of the practice are outlined in *Shipman v. R. K. O. Radio Pictures, Inc.*, *supra*, as follows:

"The practice followed is, in effect, a motion by the defendant for a summary decree of dismissal, and on such a motion the works themselves supersede and control any allegations of conclusions of fact about them or descriptions of them which may be contained in the complaint. Cf. *Lowenfels v. Nathan* (D. C.), 2 F. Supp. 73, at page 74. The situation is, indeed, as defendant's counsel aptly suggests, similar in its effect to the annexation to a complaint, by amendment or otherwise, of a contract, when of course the terms of the contract itself would juridically override any allegations about its construction or effect. For courts deal with the actualities of situations before them, not with interested comments thereon."

Consequently, the motion to dismiss admits the truth of the facts well pleaded in the complaint, except those facts or allegations which are superseded by the amendment incorporating the two works into the bill. Appellee's motion accordingly admits that appellant created and wrote a play entitled "Dancing Destiny"; that she has at all times maintained the same in unpublished form; that she delivered her play to appellee on two separate occasions, on each of which the manuscript was subsequently returned to her by appellee; that appellee produced a motion picture entitled "Stowaway" which it distributed for profit; that appellee had knowledge that appellant was the owner and proprietor of the play "Dancing Destiny" and that appellant at no time granted appellee any right, license or privilege to produce the same in motion pictures.

What Questions Are Properly Before the Court.

Appellant appears to contend in her brief that the motion to dismiss admits the *originality* or novelty of her work., *i. e.*, the allegation contained in paragraph 5 of the bill "that the said play was written as an original and independent undertaking by said plaintiff, the author thereof, as aforesaid, and contains a large amount of matter wholly original with the said author thereof, and constitutes copyrightable subject matter, according to the common law of copyright". [Tr. p. 5.] In this she mistakes the proper scope of the inquiry in the court below as prescribed by the authorities hereinbefore cited. These allegations concerning originality and copyrightability are conclusions

of fact “which are superseded by the realities”—to paraphrase *Lowenfels v. Nathan, supra*,—for the court deals “with the actualities of situations before them, not with interested comments thereon. (*Shipman v. R. K. O. Radio Pictures, Inc., supra*.)

The question of originality, in the sense of novelty of treatment, entitling the author to the protection of the common law or of the copyright statute is just as definitely before the court for determination as is the question of infringement.

In *Caruthers v. R. K. O. Radio Pictures, Inc.*, D. C. N. Y. (1937), 20 Fed. Supp. 906, which was a suit in equity for the alleged infringement of a *common law copyright*, the court, granting a motion to dismiss, said:

“The inquiry in causes of this kind when access is proved, or admitted, as it is here for the purposes of this motion, is always: (1) What, if anything, the defendant has appropriated; (2) if he did appropriate anything, whether what he took was copyrightable material; and (3) if so, whether it was a substantial and material part of the copyrighted work, playing a role of consequences therein. *Cf. Dymow v. Bolton*, 11 Fed. (2d) 690, 691 (C. C. A. 2); *Wilson v. Haber Bros.*, 275 Fed. 346, 347 (C. C. A. 2); *Rush v. Oursler* (D. C.), 39 Fed. (2d) 468, 472; *Chatterton v. Cave*, 3 App. Cases 497; *Drone on Copyright* at page 415.”

In that case, the court decided that such incidents, occurring in plaintiff's unpublished manuscript, as were du-

plicated in defendant's motion picture were wholly lacking in originality and were "familiar to all readers of stories of the western frontier and the rough life led thereon by its earlier settlers". The alleged duplication of plaintiff's characters was dismissed by the court in these words, "The characters therein are without such distinctive qualities as to be a *sine qua non* of their copyrightability".

In the *Shipman* case, *supra*, the court pointed out:

" . . . access to the plaintiff's works is, obviously, not fatal to the defense (citing cases) for the additional question always is whether, having access, the defendant has made unfair use of a sufficient amount of the plaintiff's copyrightable matter to justify a holding of infringement." (Citing cases.)

"If what the alleged infringer took was not copyrightable, the copyright owner may not complain, although his work may have been what directly inspired the work of the infringer."

The questions involved on this appeal, therefore, require a determination from a comparison of the two works, of the following questions:

(1) What elements of similarity exist between appellant's work and appellee's motion picture?

(2) In which of such elements can appellant have rights of ownership?

(3) If any elements belonging to appellant were taken, was the appropriation a material part of her work?

ARGUMENT.

I.

The Elements of Similarity That Exist Between Appellant's Play and Appellee's Picture.

In considering those elements of similarity that may exist between the two works involved in this suit it is well to bear in mind the fact that both the play and picture portray stories, the construction and treatment of which are as trite and old in the realm of literature as the story of Cinderella. In fact, the stories in both play and picture are but a slight variation of the Cinderella theme.

A careful analysis of both works discloses, at most, the following general similarities:

(a) A more or less precocious American child heroine, with the ability to sing, dance and speak Chinese, whose adventures begin in China and who is under the influence of missionaries.

(b) An escape by the child from Chinese bandits.

(c) The finding, by the child, with the aid of an old Chinese gentleman, of someone to care for her.

(d) A bachelor's meeting with American friends in a Chinese seaport.

(e) The departure of the child from China on a steamer.

(f) The culmination of a romance between a bachelor and a girl.

(g) The friendship and sympathy of the child with all persons with whom she comes in contact, including serv-

ants, and the ripening of a better understanding between a man and a woman through their love for the child.

The variation of the Cinderella theme to which we have referred may, in the light of the current popularity of a famous child star in motion pictures, be appropriately designated as the Shirley Temple theme, in the development of which the accepted and apparently required factors involve, first, an opportunity for the star to display her histrionic talents; second, assorted incidents or sequences of incidents that endanger the child's safety or happiness, creating excitement and suspense; third, a role for the child star in which she wins and is loved by all of those characters in the story with whom she comes in contact; fourth, an older character or characters, usually of a philosophic and paternal bent, whose friendship with the child is calculated to lead to either humorous or sympathetic reactions on the part of the audience and, fifth, some form of so-called "love interest" influenced, ripened or brought to fruition by the activities of the child (usually uncalculated by her to accomplish the result). Whether a more original theme or plot could or could not be devised for such pictures is inconsequential, since the fact remains that on the stage, as well as on the screen, the formula has been well known and not only accepted but generally followed for many years.

Studying the comparison of appellant's play and appellee's picture contained in the brief for appellant, it appears that counsel lay special emphasis upon the following elements, pointed out as being similar in each story, viz., an orphan, a bachelor, a steamer, a butler (in the picture it is a valet, not a butler) and a reconciliation. Given the well-known prescription for a play or story involving a child, saved from misfortune and living happily ever after

in comfortable circumstances, it is difficult to imagine how either story could end with the usual and expected denouement without the presence of most, if not all, of these (or substantially the same) ingredients.

II.

In Which, If Any, Elements of Similarity Between the Two Works has Appellant Any Rights of Ownership?

Upon a consideration of the elements of similarity that have been noted, it appears obvious that neither their combination into a story theme, nor any one of them separately, can be the subject of property in which the appellant may acquire exclusive ownership by virtue of either statutory or common law copyright.

The extent to which the courts will protect the particular result obtained from the weaving of a combination of incidents into a story theme is well defined in the case of *Roe-Lawton v. Hal E. Roach Studios, et al.*, D. C., Cal. (1927), 18 Fed. (2d) 126, the quoted portion of the decision indicating the facts sufficiently to illustrate the point involved. In that case Judge James said:

“It is intimated in some decisions that the appropriation of a theme violates an author’s copyright. In its ordinary meaning, a theme is understood to be the underlying thought which impresses the reader of a literary production, or the text of a discourse. Using the word ‘theme’ in such a sense will draw within the circle of its meaning age-old plots, the property of everyone, and not possible of legal appropriation by an individual. It is the theme presented in an original way—with novelty of treatment or embellishment—which becomes the property of an

author, in the exclusive use of which a copyright will protect him. * * *

“Plaintiff, adopting what was common knowledge respecting the wild horse and man’s power over it, built her stories with a framework of fact, weaving in, for incidental and attractive interest, romances between men and girls. * * *

“The two pictures of the defendant Roach Studios featured the wild horse, and especially a magnificent specimen, who was the leader of the band, and carried out the common theme of the power of man over the animal. There was the incidental love story accompanying each. However, comparing the picture stories, as told by the films and their explanatory legends, I have been unable to conclude that there is substantial identity of scenes, incidents depicted, or treatment of them in whole or in substantial part.

“If it could be said in this case that the Roach Studios, using the underlying theme of plaintiff’s stories, had adapted characters and incidents closely resembling those used by the plaintiff in the exposition thereof, infringement would be shown. There are a few incidents in the films which are quite strikingly similar to those which the stories describe, but they all belong to the character of natural and expected happenings, considering the normal action of animals and persons placed as the characters are in the environment in which we find them. It is not a test of infringement that such similarities exist.”

The case of *Fendler v. Morosco* (1930), 253 N. Y. 281, 171 N. E. 56, was one in which the defendant had had access to plaintiff’s manuscript and thereafter wrote a play entitled “The Bird of Paradise”. There was some resemblance in theme and situation and much

resemblance in the details of atmosphere and local color between plaintiff's manuscript and defendant's play. The court held that there had been no violation of the plaintiff's common law copyright, saying (on page 61):

"We have assumed that even these similarities in details are the result of suggestions derived from the play 'In Hawaii', though argument to the contrary might be made. Even if a surreptitious reading of the play 'In Hawaii' may have resulted in the introduction of some new material into 'The Bird of Paradise', where resemblance is close, the material is trivial in character and, where the material is more important in the development of the story, then, at most, plaintiff's ideas have been appropriated, but used in different form and combination. No material part of plaintiff's literary property has been appropriated. Neither in substance nor in embellishment is there any resemblance between the two plays. Details must be viewed in their setting; then resemblances vanish."

The language of Judge Manton's decision in the case of *Eichel v. Marcin*, D. C. N. Y. (1913), 241 Fed. 404, is particularly pertinent to this controversy. The court in that case said:

"The resemblance between the two dramatic compositions, I am of the opinion, are minor instances and are not important. The copyright cannot protect the fundamental plot, which is common property, as was pointed out above, long before the story was written. It will, of course, protect the author who adds elements of literary value to the old plot; but it will not prohibit the presentation by someone else of the same old plot without the particular embellishments."

As to the separate items of similarity, it appears too clear to deserve extensive argument that no one of them could, upon any theory, be deemed a proper subject of ownership in which appellant could have acquired title. Neither a child heroine nor a child heroine who begins her career in China can be said to be a novel creation by appellant and, as to the child's precocity and ability to sing and dance, the general use of such talents in similar works has been already pointed out.

As to the escape from Chinese bandits and the aid of the old Chinese philosopher, these are natural, ancient and not novel ingredients of the Chinese atmosphere. In the case of *Fendler v. Morosco, supra*, the court said:

“In spite of entire dissimilarity of the two plays in theme and story, there are many similarities in detail. Perhaps this is inevitable in two plays about Hawaii, which seems to suggest to Americans the hula dance and the sport of swimming; flowers and sunshine and music; it suggests, too, the dread disease of leprosy. All these things are introduced, though with varying emphasis, in both plays. Doubtless the value of the producing rights of plaintiff's play must have suffered by the successful production of any play about Hawaii. Of that she cannot be heard to complain.”

So is it inevitable that in two plays dealing with China those attributes of the Chinese atmosphere that would naturally occur to the American mind, such as bandits, Chinese philosophers, philosophical sayings, river boats, plagues, droughts or famine are almost certain to recur.

Certainly the departure of the child from China on a steamer is not a novel idea and, in this connection, it

should be further noted that in appellant's play the steamer episode receives but casual mention, whereas the sequence of events on board ship in appellee's picture occupies more than sixty-five per cent of the entire narrative.

There remain, among the similarities above mentioned, first, the culmination of a romance (as to the novelty or originality of which we believe appellant will hardly attempt to lay claim); second, the fact that the bachelor meets American friends in a Chinese seaport (scarcely a development of outstanding originality or novelty in literature) and, third, the friendship of the child with all persons with whom she comes in contact (the natural and ordinary development of the character of any child star).

This court has held, in the outstanding case of *Witwer v. Harold Lloyd Corporation*, 65 Fed. (2d) 1, as follows:

“In the case at bar, if it be assumed that there are such similarities between the story and the play as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable. The copyright of a story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another.”

III.

There Has Been No Appropriation by Appellee of Any Material Portion of Appellant's Work.

Assuming for the moment that appellant has conceived novel ideas that appear in appellee's picture, a casual examination of both works conclusively demonstrates that the portions as to which similarities exist are not material in the development or treatment of the screen story. For the convenience of the court, a brief and accurate resumé of both the play and the picture have been prepared and are included in the appendix to this brief. A careful comparison of either the full text of the two works in question or of these resúmes will evidence the facts that the theme, characterizations, character development, treatment, plot, incidents and all of the other material components of appellee's picture are substantially different from and clearly unlike the corresponding components of appellant's play. In other words, such similarities as exist are but minor features in the development and treatment of both play and picture.

To pursue this line of reasoning further, and to its logical conclusion, it is but necessary to examine those features in which the two works are dissimilar and the extent and importance of such dissimilarities. They may, we believe, be best considered as they are set forth below:

Play

1. A very substantial part of the story is laid in the Chinese atmosphere with characters definitely established therein, including the arrival and early life of the

Picture

1. The Chinese atmosphere is entirely incidental and for introductory and background purposes only, the action being taken out of China before the actual

child heroine in China, the life of the missionaries, the friendship of the child heroine with a little Chinese girl, and a lengthy sequence of events in Hong Kong.

2. The story commences with a major tragedy in the life of the child heroine, consisting of the death of both of her parents.

3. At the outset of the story the child has been continually under loving parental care and the lack of it grieves her.

4. The friendship of the two children and its impending termination, as well as their later reunion are important introductory and sentimental features.

5. The Chinese philosopher and the father of the child heroine are close, sympathetic friends, an important feature in the development of the atmosphere of the early part of the work.

6. The two children fall into kind hands and have no problems of sustenance or support.

story development is commenced.

2. There is no tragedy in the early, or any part of the picture.

3. The child has known no parental love, and her actions are substantially affected by her acceptance of her new lot without fear for the future or regret for the past.

4. The child heroine has no close child friends at any time.

5. The Chinese philosopher and the missionary-guardian of the child are completely unsympathetic, and their relationship is briefly touched upon.

6. The child is robbed and becomes a helpless waif.

7. Hathaway (male lead) is a serious-minded, purposeful person, and all of his actions, which contribute materially to the story are a reflection of, and influenced by these personal traits.

8. Hathaway assumes all responsibility for the child, seriously and with a sense of responsibility.

9. The acceptance by Hathaway of the child's custody as a duty is difficult for him because of his fear of what his mother will think of the situation.

10. The authorities are delighted to have Hathaway take over the responsibility of caring for the child.

11. The two leading characters, during a material part of the action, are separated by a lovers' quarrel resulting from a misunderstanding.

7. Randall (male lead) is a wastrel and playboy, and all of his actions (until his regeneration in the final portion of the story) are a complete reflection of these characteristics.

8. Randall regards the child as an amusing plaything, takes her with him for his personal enjoyment and because the situation is a novelty and not a duty.

9. Randall, regarding the acceptance of his charge as a lark, has no qualms whatsoever about the situation.

10. The authorities trace the child's wanderings and demand her return, furnishing thereby an important reason for further developments in the story.

11. The two leading characters are never separated except for brief intervals and, except for Susan's lack of respect for Randall, their fondness for each other is never interrupted.

12. There is portrayed no portion of the action on shipboard or of the journey between China and England.

13. A substantial part of the story is laid in a family atmosphere in an English home.

14. There is no rivalry for the hand of the heroine.

15. The love of the other characters for the child results in the reunion of a divided family, but the child has little or nothing to do with that portion of the story development which brings the two lovers together.

16. After the departure from China, the atmosphere is entirely British.

17. The child's place in the Hathaway home is won by her despite various ob-

12. The greater portion (more than sixty-five per cent) of the action takes place either on shipboard or during the journey away from China, and the larger part of the incidents occurring are completely built around the shipboard and travel atmosphere.

13. There is absolutely no home atmosphere introduced.

14. The rivalry for the heroine's hand is an important development of the story.

15. The child is the author's tool throughout in bringing and keeping together the two lovers.

16. After the departure from China, the atmosphere is entirely American.

17. The child's place in Randall's life is, with one exception—the cable from

stacles, apparently planned to create suspense.

the American Consul in China—never in danger, nor are there any obstacles placed in the way of Randall's guardianship.

18. Hathaway's romance is a case of love at first sight on the part of both the man and the girl.

18. Randall's romance, though somewhat precipitous on his part, is consummated only after he has overcome the difficulties created by his reputation and mode of life.

Thus in atmosphere, characterization, character development, locale, motivating incidents—in fact, in every material component of each work under consideration, there are present such divergent methods of treatment, expression and construction that the similarities between them become entirely inconsequential. Certainly, therefore, it cannot be argued with any degree of reason that their likenesses are of the substantial materiality required by the courts to sustain a charge of piracy.

We are treating with a situation that may be well characterized by the following quotation from the opinion of the court in the case of

Frankel v. Irwin, D. C. N. Y (1918), 34 Fed. (2d) 142.

“So far as plot in this sense is concerned, there is no similarity between Frankel and Scott. There is great likeness in environment; *i. e.*, in both a person, or persons, are prevented by many difficulties from going abroad after that purpose had been announced; therefore, to save their faces they determine to remain hidden in their nominally closed houses during

the period of proposed absence. This does not tell a story or even guide one. It is hardly as much as the motif in music, of which the treatment may be grave, or gay, lively or severe, and, just as it is the treatment of the motif that makes the music, so it is the treatment of the humans put into the stated environment that makes the play; indeed, this common starting point quite as easily suggests dramatic punishment of a sordid soul as the amusing difficulty of living a lie.

“This incident or background for farce, comedy, drama, novel or homily, is common property; no one can appropriate it, nowadays at all events. The happenings in a supposedly empty house have been too often exploited for literary purposes * * *.

“When one attempts comparison of the two works in those matters as to which copyright protects—that is, the spirit or soul infusing the creatures of the author’s imagination, what they desire, and how they go about achievement, the reasons for their actions and the words in which such reasons are expressed—I can see nothing but differences.”

To the same effect is the view adopted in the case of

Nichols v. Universal Picture Corporation, C. C. A. 2 (1930), 45 Fed. (2d) 119.

“The only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation.

“If the defendant took so much from the plaintiff, it may well have been because her amazing success seemed to prove that this was a subject of enduring popularity. Even so, granting that the plaintiff’s play was wholly original, and assuming that novelty

is not essential to a copyright, there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'

"Still, as we have already said, her copyright did not cover anything that might be drawn from her play; its content went to some extent into the public domain. We have to decide how much, and while we are as aware as any one that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases. Whatever may be the difficulties, *a priori*, we have no question on which side of the line this case falls. A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*."

In the case of

Ornstein v. Paramount Productions, Inc., D. C.
N. Y. (1935), 9 Fed. Supp. 896,

a scenario submitted by plaintiff to defendant was held to be not infringed by the production "*The Blonde Venus*." The basic plots of each were closely parallel except in their denouement. In the scenario the wife, who had been abandoned by her husband for her infidelity which was prompted by her need for money to procure medical treatment for the husband whom she dearly loved, died, while in the motion picture the couple, estranged for identical causes, become reconciled through the intervention of their

child. It was admitted on argument the theme was in the public domain, so plaintiff's claim was "that sequential development of his plot" had been stolen. Holding for defendant, the court says:

"It is almost inevitable that in variations in the treatment and development of the plot the principal events giving rise to similar emotions will occur with more or less like sequences; so that an author's exclusive rights are largely confined to the details, manner and method of his own particular presentation of it.

"From the synopsis of the play and of the photoplay it is evident that, while both authors make use of a common fundamental plot, the stories told are not the same. There is a material difference in the characters of the principals and the episodes, although there is bound to be a resemblance in the basic narrative. The scenes, locale and action differ. The dialogue also is materially different and naturally the stories are not the same. * * *

"The pleadings admit that defendants had access to complainant's play, and no proof to the contrary having been received, it seems likely that some of the ideas found in defendant's photoplay were suggested by complainant's play and other older books and plays. However, in my judgment, defendants have taken nothing from any of them that was not in the public domain or public property."

Counsel for appellant seek to show that a "material and critical portion" of appellant's play has been appropriated,

and in support of their contention dwell at great length on the ruling of the court in

Sheldon, et al. v. Metro-Goldwyn-Mayer Picture Corp., et al., C. C. A. 2 (1936), 81 Fed. (2d) 49.

In that case, the similarity between the stage play and the motion picture was so exact that, as the court said in its opinion,

“the dramatic sequence of the scenes we have recited is the same, almost to the letter.”

and

“We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue.”

Such a description of infringement cannot in the wildest flights of fancy be applied to the instant controversy.

It is earnestly urged that appellant’s play is not injured, that a comparison of her play with appellee’s picture disclose such substantial differences in those material elements of each that no infringement of appellant’s rights can be found.

IV.

The District Court Was Not Required to Make Findings of Fact and Conclusions of Law Upon Granting the Motion to Dismiss.

Appellant's final assignment of error takes the position that the District Court was required by Equity Rule 70½ to make special findings of fact and state its conclusions of law thereon, even though the proceeding before the District Court was determined upon a motion to dismiss her bill as amended. The cases cited by counsel do not support this contention in any degree.

Louisville & N. R. Co. v. U. S., D. C. Ill. (1934), 10 Fed. Supp. 185, was a suit in equity brought before a three-judge court to enjoin the enforcement of an order made by the Federal Coordinator of Transportation, the plaintiff urging the invalidity of the order. No testimony was taken but the cause was heard and determined upon the pleadings and certain exhibits attached to the complaint and upon an affidavit filed by the defendant. The court made and filed detailed findings of fact and conclusions of law, as it was indeed required to do. It was necessary for the court to determine questions of fact before coming to its decision that the order in question was valid, and in holding that the provisions of the Equity Rule were imperative in such cases the court was plainly correct, for the rule specifically requires the making of findings in all cases in equity heard before three judges.

Parker v. St. Sure, C. C. A. 9 (1931), 53 Fed. (2d) 706, was a proceeding in mandamus to require the trial court to make more extensive findings, petitioner objecting to those prepared, served and filed by the successful litigant, under the direction of the District Judge. The appellate court simply held that the degree of detail necessary in findings was committed to the discretion of the District Judge, and accordingly declined to issue the writ. Here, again, there had been a full trial upon controverted questions of fact.

We do not believe that appellant can seriously urge this claim of error. A motion to dismiss raises questions of law only, and in granting such a motion the court merely determined that the bill as amended did not state a cause of action. There were no questions of fact raised and there were none to be found.

As the court says in *Ornstein v. Paramount Productions, Inc.*, D. C. N. Y. (1935), 9 Fed. Supp. 896, which was a copyright case, determined upon a motion to dismiss:

“If it appears from the examination of the play and the photoplay that the photoplay does not infringe, there is no reason for having a trial or passing upon the other issues.”

Conclusion.

We have shown, we believe, conclusively that there has been no appropriation by appellee of any material portion of appellant's play in which she has any rights of common law copyright.

We have also demonstrated that the methods of treatment of the few similarities that may be found in broad outline in the two works is in each case so divergent as to completely repel the charge of piracy.

We therefore respectfully urge that the decree of the District Court be affirmed.

Dated at Los Angeles, California, this 20th day of July, 1938.

Respectfully submitted,

ALFRED WRIGHT and
GORDON HALL, JR.,
Solicitors for Appellee.

APPENDIX.

Outline of the Play "Dancing Destiny".

In the interior of China, Arthur Walton, an American missionary, is joined by his wife and their little girl, Désirée, or Destiny, as she comes to be called. Walton's wife, a dancing-teacher, has taught little Destiny to dance. As a minister, Walton disapproves of this and forbids Destiny to perform in public, but she continues to dance for her family and friends.

Walton has a good friend in Li Ling Chu, a wealthy Chinese, whose little daughter, Fair Blossom, is about Destiny's age. The two children become playmates and Destiny "begins to pick up some Chinese words."

Li Lung Chu is going to Hongkong, where his daughter is to sail for England to be educated and he invites the Waltons, including Destiny, to accompany him on this trip to the coast. On their way to take the river boat, the entire party is captured by bandits. Realizing they are facing death, Li Ling Chu, giving gold and the boat tickets to Destiny and Fair Blossom, tells the children to creep to the river bank and hide in the rushes until the boat comes. Shortly afterward, as the boat appears, Li Ling Chu and the Waltons are killed by the bandits.

In the excitement, Destiny and Fair Blossom get on the boat, where they hide, but come out as soon as it gets under way. There is no question of the children being stowaways, as they have tickets, but Destiny refuses to give them up to anyone excepting their parents. At

this point, one of the passengers, Winston Hathaway, a young Englishman, befriends the children and tells them of their parents' death.

An agent of Li Ling Chu assumes charge of Fair Blossom and Hathaway takes Destiny to the American Consul in Hongkong. The latter says it may take months to trace Destiny's relatives in America and Hathaway, having become attached to the little girl, finally decides to take her to his home in England and send her on to her American relatives when they are found.

In Hongkong, Hathaway comes across a friend, Peter Norman and, through him, meets an English girl, Ruth Stevens, who is stranded, as she did not get the job she came to China to take. Becoming interested in Ruth, Hathaway insists that she accept a loan that will enable her to return to England. Destiny also meets Ruth and takes a great fancy to her.

When Hathaway's friend, Peter Norman, checks out of the hotel, Ruth is given his room. Not knowing that Norman has vacated the room and seeing Ruth coming out of it, Hathaway believes she is having an affair with his friend and is even more sure of this on learning they sailed for England on the same boat. Although Ruth is really a fine, virtuous girl, Hathaway, now believing otherwise, resolves to put her out of his life.

Hathaway and Destiny are next seen as Hathaway arrives at his home in England with the child.

Reaching England without funds, Ruth endeavors, on her arrival, to sell a stamp collection left her by her father

and takes it to a collector, who turns out to be Hathaway's father. Mr. Hathaway is a testy, explosive old gentleman, who has so quarreled with his rather caustic wife that they live in separate parts of the house and rarely speak to each other. Taking a liking to Ruth and learning she can play chess, Mr. Hathaway has her come to live in the house as his secretary. As yet, Ruth does not know she is in the home of young Hathaway, who won her gratitude by helping her in Hongkong.

And now Hathaway arrives with Destiny. The child is somewhat begrudgingly taken in, but soon wins the affections of both Mr. and Mrs. Hathaway, as well as the servants, including the dignified butler, Hawkins.

Surprised to find Ruth in his home, Hathaway, always believing she had been the mistress of his friend, Norman, treats the girl with frigid politeness.

The way in which Mr. and Mrs. Hathaway try to monopolize little Destiny results in heated arguments between them, but the tenderness they both show the child stirs memories of the happy days when their own children were young and is gradually melting away the barrier that has grown up between them.

And now, when young Hathaway's friend, Norman, comes to see him and explains that Ruth, who means nothing to him, took his room *after* he left the hotel, Hathaway realizes how he misjudged the girl and resolves to make amends for his unjust suspicions at the first opportunity.

One day, when Fair Blossom, the little Chinese girl who is being educated in England, has come to spend the day with Destiny, the house is thrown into a panic by the news that Miss Abigail Walton, Destiny's American aunt, is coming to take the child away with her.

When Mrs. Hathaway sees the elderly Miss Walton, her heart sinks at the thought of turning over her happy little charge to the spirit-breaking discipline of this severe, narrow-minded spinster. Miss Walton curtly refuses to leave Destiny with the Hathaways, saying she has a duty to do by her nephew's child and she is going to do it.

And then Mrs. Hathaway, who has a sudden inspiration, goes and gets little Fair Blossom, instead of Destiny, and takes her to Miss Walton without saying a word. Jumping at the conclusion that this is her nephew's child, Miss Walton gives a gasp of horror as she thinks of what her neighbors in New England will say if she brings back a "heathen Chinese" as a Walton, and an illegitimate one at that. She can't face this disgrace, and, telling Mrs. Hathaway she can have the child and welcome, Miss Abigail Walton rushes out of the house as though afraid of being contaminated.

Learning from his friend that he has misjudged Ruth, Hathaway begs her forgiveness and she happily consents to become his wife. Hathaway's parents plan to bring up Destiny, who, because of their mutual love for her, is the passive instrument in bringing about a better understanding between them. And so both orphans, Ruth and little Destiny, are to remain in the Hathaway family.

Outline of the Picture "Stowaway".

Orphaned when her missionary parents were killed by bandits, little Barbara Stewart, at the opening of the picture, is living with Mr. and Mrs. Kruikshank, also missionaries, in a Chinese village. A bright, versatile child, Barbara speaks Chinese fluently, exchanging quaint sayings in that language with her good friend, Sun Lo, the village magistrate.

When told the bandits are again approaching the village, Kruikshank refuses to leave but Sun Lo, to save Barbara, virtually kidnaps the child and, planning to send her to his brother in Shanghai, entrusts her to a coolie to take to that city in a junk. On arriving at Shanghai, the coolie starts gambling and Barbara is left to fend for herself. Wandering about the streets with her dog, she sees Tommy Randall, rich American playboy, trying in vain to make a shopkeeper understand him and acts as interpreter. Becoming interested in the little girl, Tommy, after hearing her story, decides to help her and takes her along with him in his car.

Stopping to pick up some gay friends he had promised to take to the boat on which he is also sailing, Uncle Tommy, as Barbara calls him, is gone so long that she gets into the rumble seat, which she closes, and falls asleep. Seeing no sign of Barbara and thinking she has left him, the somewhat inebriated Tommy drives to the boat and the car is lowered into the hold.

After a time, Barbara wakes up and, raising the cover of the rumble seat, where she has been curled up, makes

her way to a stateroom occupied by an American girl, Susan Parker, and her companion, Mrs. Hope. Susan is engaged to Mrs. Hope's son, Richard, a fussy, egotistical young man, and is going to marry him when the boat reaches Bangkok, where he is employed by an exporting firm.

Although Mrs. Hope disapproves, Susan looks after Barbara and when the child explains how she found herself on board after falling asleep in Uncle Tommy's car, it is believed she is the playboy's niece. Susan and the Captain take Barbara to Tommy's cabin and, after being awakened with some difficulty by his valet, Atkins, an amusing character, he warmly welcomes the little girl and says he will pay her passage.

On finding that Barbara is the ward of the Kruikshanks, the missionaries she lived with, the Captain cables the American Consul to get in touch with them. Barbara, as personified by Shirley Temple, is so winning that she captures the affection of everyone (with the exception of the disagreeable Mrs. Hope), and Atkins, cuts up all sorts of antics to amuse her. When the little girl is tucked into bed, Tommy tells Atkins to sing her a lullaby, but the valet's attempt is such a dismal failure that Barbara sings the lullaby, with both Tommy and Atkins falling asleep.

Thus brought together by Barbara, Tommy and Susan show such a mutual interest that Mrs. Hope becomes worried and cables her son, Richard, to meet the boat at Hongkong, instead of waiting for Barbara at Bangkok.

At Hongkong, Tommy, Susan, and Barbara go into a Chinese theatre where an amateur show is being conducted and, going up on the stage, Barbara delights the audience by her singing and dancing.

On coming out of the theatre, Tommy is carrying Susan across a muddy street in his arms when they encounter Mrs. Hope and her son, Richard, who has just arrived in response to his mother's cable. They take Susan back to the boat with them and later Tommy, perturbed by this encounter, leads off a Chinese child by the hand thinking it is Barbara, who is engaged in petting a dog.

Pursued by the mother of the Chinese child, Tommy is arrested for kidnaping and Barbara goes along to jail with him.

The Captain of the boat gets them out and, on returning to the dock, Tommy encounters his gay friends, with whom we saw him in Shanghai. One of them, known as the Colonel, is quite drunk and Tommy helps him up the gangplank. Susan sees this and, getting the idea that Tommy is drunk also, is more inclined to favor Richard.

And now the Captain receives a cable saying Barbara's guardians, the Kruikshanks, were killed by the bandits. The cable instructs the Captain to turn Barbara over to the American Consul at Singapore, who is to send the child back to Shanghai where she will be placed in a missionary home for girls.

Greatly upset by this news, Tommy asks the Captain if he can't save Barbara from the home by adopting her. When the Captain replies that no court would let Tommy have Barbara because he is a bachelor, he goes to Susan and begs her to adopt the little girl, saying she will meet the requirements as she is to be married soon. And she won't have to keep the child long as he will get married himself to some girl or other as soon as he reaches the States and then come back and take Barbara off her hands.

Realizing that Tommy has plenty of good qualities, even though he has been rather wild, and is greatly attached to Barbara, Susan agrees to this plan. But, when she tells Richard and his mother she is going to adopt Barbara, they make such a row that, revolted by their selfishness, she breaks her engagement.

With Susan's marriage called off, it looks as though Barbara can't escape being sent to an institution. But Tommy, to whom Barbara's happiness has come to mean so much, now asks Susan to marry him. If they do this, they can adopt the little girl and it will be a marriage in name only. As soon as the ship reaches San Francisco, Susan can go straight to Reno and get a divorce and she will be free again in a few weeks.

For Barbara's sake, Susan consents to this and she and Tommy are duly married by the Captain of the ship.

Some time later, we find Susan in Reno, about to get her divorce from Tommy. Richard is also in Reno

and has persuaded Susan to promise to marry him as soon as she gets her freedom.

Just before the case is called, Tommy and Barbara arrive. As Susan, because of her promise to Richard, is refusing Tommy's plea that she give up the divorce, Barbara makes friends with the kindly, understanding judge and goes into his chambers with him. The judge, having seen that Tommy and Susan love each other, enters into a little conspiracy with Barbara.

When the case is called and is uncontested, the judge springs a surprise by calling Barbara to the witness-stand. Richard, sensing defeat, jumps up and objects, but is promptly squelched by the judge.

Then Barbara, in the big legal words the judge has taught her, goes on to deny the things alleged in the complaint, such as incompatibility of temperament, and states that, in her opinion, the marital status of the contestants should be left undisturbed. The judge, saying that is his opinion too, denies the divorce and tells Susan and Tommy to take Barbara and go home where they belong. Susan and Tommy decide to follow this welcome advice and everyone is happy excepting Richard. And Barbara, after expressing her delight in a song, is folded in the loving embrace of Tommy and Susan.

